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December 18, 2006

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Project No. R411001

Dear Sir or Madam:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the Proposed Rule ("Proposal") issued by the Federal Trade Commission ("Commission") regarding amending the Telemarketing Sales Rule ("TSR") to specifically address prerecorded messages and amend the standard for the safe harbor for call abandonment for predictive dialers. Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving more than 55 million consumer and small business relationships with more than 5,700 retail banking offices, nearly 17,000 ATMs and award-winning online banking with more than 20 million active users.

Call Abandonment Standard

Initially, Bank of America appreciates the Commission's willingness to take an approach similar to that taken by the Federal Communications Commission ("FCC") with regard to measuring the abandonment rate of calls made by predictive dialers for the safe harbor that allows leaving pre-recorded messages. Because Bank of America is a financial institution, many of its affiliates are not subject to the Commission's jurisdiction and rules, but are subject to those of the FCC. In addition, Bank of America understands that the Commission takes the position that vendors performing services on behalf of entities not subject to the Commission's jurisdiction would still come within the Commission's jurisdiction, thus requiring vendors to comply with the Commission's rules even when conducting programs on behalf of a national bank. Therefore, Bank of America believes that it is very important to have a consistent set of rules because the manner of conducting telemarketing activities should not be dictated by whether a business conducts them internally or uses a vendor to conduct the program.

However, Bank of America does not believe that the Proposal achieves that consistency. The Proposal substitutes a standard of "per day per campaign" with a new standard of "per campaign per 30 days," which requires measurement within a campaign (if less than 30 days) or within a campaign within each 30-day period. Alternatively, the FCC standard provides for measurement of the abandonment rate over a period of 30 days, without regard to campaigns. The TSR does not provide a definition of the term "campaign," and a quick poll of vendors resulted in varying interpretations of that term. This makes it very difficult to ensure consistent and accurate calculation of the abandonment rate under the proposed standard.

Telemarketing provides an efficient method of marketing because it allows a marketer the ability to limit its expenses in campaigns that are producing lower than expected results and move resources to more productive programs very quickly and for little additional expense. This flexibility may result in the actual length of any particular calling program being shorter than originally anticipated. A rule requiring measurement of the abandonment rate as proposed will either result in marketers continuing to call on a particular program to solve for an abandonment rate issue, which is inefficient and provides little appreciable consumer benefit, or continuing to use the more restrictive "per day, per campaign" standard.

Bank of America understands that the Commission is concerned that eliminating the "per campaign" concept in the safe harbor might allow telemarketers to target less valued consumers with a disproportionate share of abandoned calls and the record provides an example where a telemarketer may "offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones."[1] Bank of America does not believe that marketers operate in this manner and did not see evidence in the record to that effect. In addition, it is questionable whether there are "less valued" consumers in telemarketing campaigns. Telemarketers generally strive to target their calls to consumers who are most likely to be interested in the particular products being offered. There is substantial economic incentive to structure call campaigns in this fashion. Therefore, all consumers on such lists are perceived to be "valued."

Bank of America believes that the inclusion of the "campaign" standard with no guidance as to what that entails leaves telemarketers, including national banks that use vendors, uncertain as to whether they are in compliance with the safe harbor. This uncertainty and

[1] 69 FR 67287, 67291 (Nov. 17, 2004).

inconsistent approach is likely to reduce efficiency in use of predictive dialers for many businesses, especially those over which the Commission lacks direct jurisdictional authority. The impact on business and economic efficiency that this rule would cause is disproportionate to the small reduction in consumer annoyance from abandoned calls that would be permitted under the safe harbor as measured by this rule. The better, more balanced approach is to measure the abandonment rate over a 30-day period without regard to campaigns, as the FCC rule permits. Bank of America urges the Commission to take this approach.

Pre-recorded Messages

Bank of America believes that there should be an exception to the proposed pre-recorded messaging prohibition for such messages left with consumers with whom a marketer has an established business relationship. While Bank of America agrees that most pre-recorded messages currently left are informational in nature and are not telemarketing, the efficiency of use of this medium to pass along information about new products and services to existing customers has increased the interest in use of this channel of communication. Bank of America's experience has not shown that consumers find this mechanism more intrusive than live marketing messages. Many consumers appreciate the opportunity to learn about new products and services from a financial institution they know and trust. Many of these consumers also welcome the opportunity to elect to inquire further about these products and services at their convenience. Consumers can choose to listen to them or disconnect them, which can be more difficult for some consumers to do with a live operator. Therefore Bank of America disagrees that a different standard should be applied to pre-recorded messages. The established business relationship exception should apply both for pre-recorded messages left with a live consumer and those left on answering machines or services. Bank of America urges the Commission to apply the established business relationship exception to pre-recorded messages.

A different standard should not apply for a national bank when it elects to use a vendor to conduct such programs than if it does so internally under the FCC's Telephone Consumer Protection Act established business relationship exception. That difference promotes inefficiency for businesses and chills innovation of new and efficient means of communication.

The Commission has stated that a safe harbor allowing pre-recorded messages to be left with consumers with whom the caller has an established business relationship would undermine the purpose of the National Do Not Call Registry. Bank of America disagrees. The Registry allows consumers to block calls (whether live or pre-recorded) from businesses with which they do <u>not</u> currently do business. The Registry does not prevent calls to a person when the caller has an established business relationship with that person (although consumers can opt out directly with those companies). This should apply equally to pre-recorded calls. Thus, consumers on the registry should not get more calls due to the addition of this safe harbor since callers who have an established business relationship can already call those consumers.

Bank of America appreciates the opportunity to comment on the Proposal. If you have any questions regarding our comments, please contact Kathryn D. Kohler, Assistant General Counsel, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler
Assistant General Counsel